reason that it consisted in part of a decomposed animal substance, and for the further reason that it consisted in part of a putrid animal substance.

On September 27, 1923, no claimant having appeared for the property, it was ordered by the court that the product be destroyed.

HOWARD M. GORE, *Acting Secretary of Agriculture.*

11860. Misbranding and alleged adulteration of canned salmon. U. S. v. 200 Cases and 200 Cases of Canned Salmon. Tried to the court without a jury. Judgment of condemnation and forfeiture with provision for release under bond. Claimant failed to execute bond and product was destroyed. (F. & D. Nos. 15941, 15942. I. S. Nos. 18222–t, 18223–t. S. No. C–3410.)

On January 28, 1922, the United States attorney for the Southern District of Texas, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district libels, and thereafter amended libels, praying the seizure and condemnation of 400 cases of canned salmon, in part at Galveston and in part at Houston, Tex., alleging that the article had been shipped by the Seaboard Co., Seattle, Wash., on or about November 16, 1921, and transported from the State of Washington into the State of Texas, and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was labeled in part: (Can) "Kay-Square Brand * * * Pink Salmon * * * Keen-Eye Inspection Fresh Fish Clean Canneries * * * Inspected * * * Kenai Packing Co. Seattle, Wash."

Adulteration of the article was alleged in the libels as amended for the reason that it consisted wholly or in part of a filthy, decomposed. and putrid animal substance.

Misbranding was alleged for the reason that the statements appearing in the labels, "Inspected" and "Keen-Eye Inspection Fresh Fish," were false and misleading and deceived and misled the purchaser.

On March 30, 1923, the cases came on for trial before the court without a jury. After the submission of evidence and arguments by counsel the court took the matter under advisement, and on April 5, 1923, handed down the following memorandum opinion (Hutcheson, jr., *D. J.*):

"These two cases are proceedings under separate numbers against two lots of salmon, one originally libeled in Galveston and proceeded against in Galveston under the Galveston number, D. L. 724, later transferred to Houston; the other libeled against in Houston and proceeded against in Houston under D. L. No. 419.

"The Government contends for condemnation and forfeiture on the ground (1) that the articles are misbranded and (2) that they are adulterated, in that they consist wholly or in part of filthy, decomposed, and putrid animal substance, in violation of paragraphs 6 and 7 of the Food and Drugs Act of 1906.

"In each of these cases the Seaboard Company appeared as claimant and filed exceptions and answer, and under orders of the court by agreement between the parties from time to time samples of the seized shipments were taken and examined.

"Not until the trial had concluded was any point made as to the right of the claimant to appear and claim, and at that time the Government's counsel made the contention that the interest of the claimant was not shown.

"This motion, if it ever was meritorious, comes too late. (United States *v.* 46 Packages, 183 Fed. 644.)

"Each can had on it a pinkish red label showing a picture in relief of a salmon, under it the words, 'Select Pink Salmon,' by the side of the picture the following, 'Keen-Eye Inspection Fresh Fish Clean Canneries,' and this was in white lettering. In black letters, to simulate a stamp, was the word 'Inspected.'

"The evidence on the part of the Government was that this product was not Government inspected, and that if the stamp was intended to make the impression of Government inspection, it was false.

"The evidence of the Government was also overwhelming that the fish was not fresh fish in the sense of that term as used in the canning trade, that is, fish canned when they had been on the floor not over forty-eight hours—which was the time limit fixed by the Government witness and not contradicted—within which fish could be said to be fresh.

"The testimony was also overwhelming that the fish, if not putrid or rotten, was a poor and therefore not a select pack of pink salmon, for while pink salmon is according to the testimony one of the inferior brands, it varies in quality according to the freshness and general character of the fish put up.

"It is therefore clear to me that the articles seized have offended against the misbranding statute, one purpose of which is to protect purchasers from injury from the sale of inferior for superior articles (Hall *v.* Baker, 198 Fed. 615; United States *v.* 150 Cases, 211 Fed. 361), and that deception being present and that ground of forfeiture clearly existing, it would, but for the provisions of section 8726 authorizing the court to direct the delivery of the articles to the owner, be unnecessary for the court to pass at all upon the question of whether, as to any part of the shipment, the Government has made a case on its second ground.

"Upon the issue of whether the product was filthy, decomposed, or putrid, the evidence was in sharp conflict.

"I agree with the Government that it is not essential under this subdivision of section 7 to establish that the articles were unfit for food, or deleterious if eaten. It is sufficient if the Government establishes that the article sought to be condemned was composed in whole or in part of decomposed, filthy, or putrid animal substance. That the contents of some of the cans contained in the shipments under seizure were of the character described in the Government's libel, I have no doubt.

"That a great many of them were not, the Government's own testimony established, for taking the method of testing by sample which the Government itself claims to be fairly correct, they reached the conclusion that something like 18 per cent of the seizure was filthy, putrid, and decomposed, leaving 82 per cent not within the terms of the second ground of their libel, while the claimant's witnesses testified to having made chemical tests of some of the samples, finding no evidence of decomposition, and also to having experimented by serving some of the contents of the cans as food without harmful result.

"It is the claimant's contention that the test applied by the Government of smelling is insufficiently certain to justify condemnation and that even the percentage of defectives testified to by the Government has not in fact been shown, but they claim further that conceding as much defective fish as the Government's witnesses contended for, that the Government has not made a case for the condemnation of cans not already tested and proved to be bad.

"That, in short, it is encumbent upon the Government to either prove that they have examined each can and found it defective or that they have established such regularity of defects as to support the inference that all the cans are defective.

"The Government relies for the contrary of this upon the opinion of the Circuit Court of Appeals of the United States, in U. S. *v.* A. O. Anderson, an opinion from the Ninth Circuit (284 Fed. 542), in which the circuit court declared that the 'article' referred to in the condemnation statute did not mean the single or individual can of salmon but was used generically as referring to the entire salmon shipment under seizure as one thing, and that if the Government proved that one-fifth of the entire product was unfit for human consumption, it would be competent for the jury to infer from that that the balance was also.

"To these conclusions I am not prepared to lend my adherence. I concede the force of the reasoning that in section 8726 the language, 'any article of food, drug, or liquor,' if standing alone, might well have a generic meaning as relating to the character of the shipment, whether salmon or pork or beans or what not, and that it may well be said to be a case of using the word 'article' as a singular plural, or a plural singular. However, in the caption of the act the plural is used, and in the body of the act it is provided that 'upon the payment of [the] costs * * * and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold,' they may be delivered.

"Again, in the discussion of similar words in other places in the statute, the Supreme Court has seemed to take a different view from that expressed in the Anderson case. In Hippolite Egg Co. *v.* United States (220 U. S. 52) the court treats the 'articles' as the contents of packages designed for food and discusses the question of original packages as applied to the original box in which they come shipped, as distinguished from the can or package containing the food itself, and in the discussion makes it clear that they treat the word 'article' as the food itself contained in the package designed for delivery to the consumer.

"In Hoke *v.* United States (227 U. S. 323) the court said, 'In the Hippolite Egg Co. case we denominated adulterated articles as "outlaws of commerce."'

"In McDermott *v.* United States (228 U. S. 130) the court showed clearly that it considered that the word 'article' referred to the adulterated thing itself, rather than the package or case in which it came in shipment.

"Again, if the reasoning in the Anderson case is accepted, and the word 'article' is to be taken generically, still the conclusion reached in that opinion does not follow, that proof that of the cans examined one-fifth were bad and four-fifths were good would authorize the jury to find the whole product bad. It might well be as in the oyster case (Notice of Judgment 4922), opinion by Judge Hand, that where only a part of the shipment was examined, and that part ran uniformly bad, the jury would be authorized to find, if that was a fair sample, that it indicated that the whole shipment was bad; but it would not at all follow, but rather the contrary, that if a shipment was examined, and the examination showed as it proceeded that one-fifth was bad and four-fifths good, that the court could order the whole product condemned.

"The case, in short, is not one where the Government has proven a part of it bad as a basis for the inference that all was bad, but one in which the very proof of the Government establishes that part of it is not bad within the meaning of the statute, and I am inclined to think that if the Government depended for its condemnation upon subdivision 6 of section 7 of the act, in accordance with the general rule of law that the burden is upon the Government to prove its case, the Government would have to be cast in this suit or would have to take the alternative of examining and testing every can of the shipment.

"Since, however, the goods are to be condemned for misbranding, the court now makes it known that it is of the opinion that some part of the shipment is bad, and that the goods will not be released under bond to the owner merely for rebranding but only upon condition that the goods be reexamined and reclassed, the good being separated from the bad.

"Since it is not known whether any application for the withdrawal of the goods will be made, it is sufficient now to direct that a judgment of condemnation and forfeiture be entered."

On July 3, 1923, a decree of the court was entered adjudging the product to be misbranded and ordering its condemnation, and it was further ordered that the product might be released to the claimants, the Seaboard Co. and Rush Este, upon the execution within ten days from the entry of the decree of a good and sufficient bond, conditioned upon the separation by the claimants of the good from the bad portion of the product, otherwise, that it be destroyed. Subsequently, the claimants having failed to furnish bond as required by the said decree, the product was destroyed by the United States marshal.

HOWARD M. GORE, *Acting Secretary of Agriculture.*

11861. Misbranding of Egyptian regulator tea. U. S. v. 43 Packages, 13 Packages, and 1 Package of Egyptian Regulator Tea. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 14486. I. S. No. 10513-t. S. No. W-875.)

On February 1, 1921, the United States attorney for the Northern District of California, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying the seizure and condemnation of 43 small packages, 13 medium packages, and 1 large package of Egyptian regulator tea, remaining in the original unbroken packages at Sacramento, Calif., alleging that the article had been shipped by the Kells Co., from Newburgh, N. Y., in part September 3 and in part October 30, 1919, and transported from the State of New York into the State of California, and charging misbranding in violation of the Food and Drugs Act, as amended.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that it consisted of compressed herbs, including senna, coriander, dog grass, licorice root, ginger, sambucus, cinnamon, and dandelion root.

Misbranding of the article was alleged in substance in the libel for the reason that it was labeled in part on the circulars or wrappers accompanying the said article, as follows, (white circular, all sizes) "A Speedy and Positive relief for * * * Dyspepsia, Liver Complaint, Sick Headache, Nervousness * * * Nature's Own Gift To Dyspeptic, Debilitated Men, to Wornout, Nervous Women, to Mothers of Peevish and Sickly Children, to Girls Just